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Saturday, June 03, 2006

Jurisdiction as property: the paper

Here's my paper on private jurisdiction in English history. Franchise jurisdiction played a crucial but unheralded role in the history of English law and politics. Some private jurisdictions existed in Anglo-Saxon times but they grew in importance in the Norman and Angevin periods, and in the corporate form remained an important part of the British Empire until the 20th century.

A franchise, such as a corporation, a jurisdiction, or a right to collect certain tolls or taxes, was a kind of property: an "incorporeal hereditament." English property law was very flexible; as a result franchise jurisdictions came in a wide variety of forms. Franchise jurisdictions included those of manorial courts appurtenant to manors, secular courts appurtenant to ecclesiastical corporations (on top of the Church's own jurisdiction over family law), borough courts appurtenant to municipal corporations, merchant courts appurtenant to markets and fairs, and mining courts apputenant to mines and mining villages.

For many substantive areas of law, the king's courts acted only as "night watchmen" courts that reviewed, not the substance of the case, but only whether the courts stayed within their jurisdictional and certain procedural bounds. Generally, the only way to remove or undo the remedy of a franchise court case in royal court was to bring one of several varieties of lawsuits for trespass (tort) against the franchise court. Only if the franchise court was trespassing on the defendant (because it was not acting as a proper legal authority) or trespassing on the jurisdiction of the king or of another franchise court could the case be overturned. Development of the legal authority defense to trespass played a substantial role in developing many modern constitutional rights of procedure, such as the right to a jury trial. Under legal authority for trespass royal courts and officials were treated in basically the same way as franchise courts and officials. Thus, except for this "night watchmen" role of royal courts, where franchise courts and police had exclusive substantive jurisdiction the law operated in a peer-to-peer fashion via property relationships rather than in the hierarchical fashion via principle-agent or master-servant (employer-employee) relationships of imperial Rome and most modern court and police systems.

Franchises could also be for jurisdiction over partially or entirely privatized administrative territories such as "hundreds" (often like rural townships) and counties. Broad governmental powers, including almost all, and sometimes more, of the jurisdiction normally granted to royal common law and equity courts, were granted to counties Palatine and many colonial corporations (such as the East India Comany and the American colonies). The results, in terms of civil liberties, were quite varied.

In English property law, land tenures and incorporeal hereditaments (including jurisdictions) were either granted or recognized in charters in a form similar to the deeds of modern property law. When the charters involved large amounts of land with appurtenant military services and jurisdictions, they were political as well as economic in nature. These charters were the ancestors both of modern property deeds and of modern state and national constitutions.

About Me

Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

"Szabo comes out with these essays that leave me in awe." -- Brian Dunbar

"Reading material that is eclectic, challenging and endlessly fascinating." -- Sean McGrath, Propylon

"Like most blogs worth my attention, this blog is updated only infrequently. That is because the authors of blogs worth my attention only post when they have something to say that is true, relevant and not already known by their audience. Most of the human race does not have the skill to know when an idea has these three properties. The skill is particularly rare in the fields of politics and economics, which is why this blog is such a rare and valuable thing." -- Richard Hollerith

The Anglo-Norman legal idea of jurisdiction as property and peer-to-peer government clashed with ideas derived from the Roman Empire, via the text of Justinian's legal code and its elaboration in European universities, of sovereignty and totalitarian rule via a master-servant or delegation hierarchy. By the 20th century the Roman idea of hierarchical jurisdiction had largely won, especially in political science where government is often defined on neo-Roman terms as "sovereign" and "a monopoly of force." Our experience with totalitarianism of the 19th and 20th centuries, inspired and enabled by the Roman-derived procedural law and accompanying political structure (and including Napoleon, the Csars, the Kaisers, Communist despots, the Fascists, and the National Socialists), as well as the rise of vast and often oppressive bureaucracies in the "democratic" countries, should cause us to reconsider our commitment to government via master-servant (in modern terms, employer-employee) hierarchy, which is much bettter suited to military organization than to legal organization.

Fortunately, franchise jurisdiction has left permanent influences on modern governments, including on the republican form of government in general and the United States Constitution, federalism, and procedural rights in particular. It also left a record of a wide variety of forms of law and government that can provide us with alternatives to the vast employee hierarchies weilding coercive powers that have given rise to modern oppression.

Posted by Nick Szabo at 12:43 PM

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